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ABSTRACT

This interim report about the court's order for voluntary, interdistrict desegregation in the St. Louis, Missouri public schools was filed by the Desegregation Monitoring and Advisory Committee. The report discusses the problems of defining the relationship between "voluntary" and "mandatory," and developing alternative solutions to desegregation. The issue of whether a voluntary plan can protect participating districts against further litigation is examined with respect to the following questions: (1) Is there a legal barrier to a resolution of potential school desegregation claims against a county school district by means short of full litigation of a district's liability? (2) To what extent can such a resolution eliminate a county school district's exposure to future school desegregation litigation? and (3) What criteria must such a resolution meet? The characteristics of a possible voluntary, cooperative interdistrict plan are discussed in response to these questions. (Author/JCD)

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DESEGREGATION MONITORING AND ADVISORY COMMITTEE

Report No. 3

Submitted By

Edward T. Foote, Chairman

U.S. DEPARTMENT OF EDUCATION
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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

October 23, 1980

in the cause of
Craton Liddell, et. al, Plaintiff

vs

The Board of Education of the City of
St. Louis, Missouri, et. al, Defendants

Federal District Court
Eastern District of Missouri
cause no. 72-100-C (C)

UD021778

INTRODUCTION

This is an interim report limited to that part of the Court's order concerning plans for "voluntary, cooperative" interdistrict desegregation. I file it now, before the next Court-required deadline, because much has happened, and the preliminary outlines of a framework for a voluntary plan are taking shape.

I file it now also because the further development of an effective voluntary plan depends on much wider public understanding than now exists of the differences between such a plan and interdistrict "forced busing" currently generating interest in St. Louis County.

After years of adversary proceedings in a case like this, the concept of anything "voluntary" seems alien to many. I should describe, therefore, my interpretation of the word as used in the Court order. I have understood "voluntary" in the full, and usually accepted sense. In short:

> No school district would be forced to participate in such a plan, and
>
> No student would be forced to attend any school but that to which he or she would normally be assigned.

The report consists of this introduction, the status and some analysis of activities and a ten-point preliminary outline of emerging key elements in a voluntary, metropolitan-wide desegragation plan. Although still only a hazy picture, the plan is one that could provide to all children in the area expanded educational opportunities, to black children still in all-black schools the opportunity for desegregated education, and to all concerned a way to "settle" this and potential future school desegregation litigation without mandatory remedies.

To put this report in perspective, a summary of events concerning a "voluntary, cooperative" plan may be helpful.

The Court's May 21, 1980, order approving the desegegation plan submitted by the St. Louis Board of Education included the following directive to the State defendants, the United States and the Board (paragraph 12a):

> "To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980."

The May 21 order included, also, directives to the same parties concerning inter-district studies of housing and vocational and special education, which this report will not cover, and the following (paragraph 12c):

> "To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County."

In addition to my general responsibilities as Chairman of the Desegregation Monitoring and Advisory Committee, the Court has asked me (paragraph 5b of the June 27, 1980, order) ". . .to coordinate compliance with the provisions of the Court's order dated May 21, 1980, concerning voluntary cooperative interdistrict school desegregation".

(To avoid any misunderstanding, I am not privy to, nor have I sought, any but the most casual information on the status of work done under paragraph 12c of the order, generally understood to concern a "mandatory" plan.)

Activities under the Court's order to explore voluntary alternatives began promptly and continued during the summer. The report to the Court of August 22, 1980, filed by the State, the United States and the Board, as amended, summarizes their activities. I will not repeat that information here, except to note that most County school districts responding to various inquiries have kept open the door for continuing discussion of a "voluntary, cooperative" plan.

Although no County district had agreed to any formal plan, by latest count 17 white children have voluntarily transferred to City schools this year, and one black child has voluntarily transferred to a County school. It is a beginning. I reported to the Court last month:

> "Although the odds of metropolitan-wide cooperation may be long, most County Districts have now expressed a willingness to keep talking. I certainly take these expressions of intent as made in good faith. No one considering the challenges of "settling" a case of this dimension, not to mention its possible extensions, should do so with unrestrained optimism. But pessimism at this stage is premature."

Because of the extreme pressure on St. Louis school officials to comply with the Court's order in time for the opening of school, and the inter-district activity already generated, I delayed any concerted efforts in my "coordinating" capacity until City schools were open and operating. That seemed the first priority under the orders. I limited my activities during

the summer, therefore, to preliminary conversations with State officials and others interested or knowledgeable in the subject but, with few exceptions, not directly involved in complying with the Court's orders.

Since school began, however, I have spoken with many people. What follows is necessarily somewhat general in places. Some of it is known t- m only secondhand. Some of the information reported comes from confidential communications among many people who are either involved already in litigation, or may be. I have promised to respect those confidences.

Categorically, however, I have spoken with the officials involved in overall planning for the State of Missouri, Commissioner of Education Arthur Mallory and his staff; with representatives of the United States; with some, but by no means all, of the superintendents, and a few Board members of St. Louis County school districts; with lawyers who represent St. Louis County school districts; with lawyers who represent the parties in the case; and with others familiar in one way or another with education, the law or this case.

THE STATUS OF CREATING "A VOLUNTARY, COOPERATIVE PLAN"

This interim summary is stitched together from many conversations, some assumptions and a little analysis. Some of what follows goes beyond what I can verify factually firsthand. It includes assessments of the facts, perceived possibilities, and some of their likely consequences.

Last May, when the Court ordered study of a voluntary, cooperative plan, most people saw the odds against that as very long. They remain long, but the activities of the intervening weeks have expanded the realm of the possible. What has changed?

First, the opening of school in the City under the desegregation plan occurred in an orderly fashion, not without problems, of course, but generally praised by most observers.

Second, discussion among those directly concerned has moved well past the reported openers, some a bit shrill, that dominated the headlines for awhile. Some early misunderstandings among those talking, or failing to, seem to have been corrected. Discussions among those concerned with real solutions no longer stop at the question, "are you for busing or against it?" Some of the public debate remains at that level, and understandably so, but those seriously considering actual alternatives have realized that this part of the Court's order concerns a voluntary alternative to mandatory movement of children. As described more fully below, the passage of time has allowed more thorough analysis of the practical alternatives.

Finally, and in the long run most importantly, more people are concentrating on the positive educational advantages to children, all children, of metropolitan specialty programs, magnet schools offering courses of study no

one district could afford, long range planning to the mutual advantage of everyone, and generally taking steps to redress the wrongs of the past in ways that make at least as much educational as legal sense.

As I expanded my circles of communication after the opening of school, I learned that representatives of several County districts seemed genuinely interested in exploring a voluntary, inter-district plan. This interest went beyond that naturally stimulated by a Federal Court order. It included considerable enthusiasm about possible educational benefits to the children served by these districts, regardless of any court order.

Explorations of these possibilities, however, were inhibited by that part of the Court's order that suggests a "mandatory" remedy and the fear of being joined in desegregation litigation, also leading presumably toward mandatory, not voluntary, remedies. (These County representatives were understandably unsure, in other words, whether to concentrate on cooperation, or to assume a completely defensive position for years of litigation. The latter alternative hardly fosters the former.)

I found, also, that there was some disagreement among the parties about the appropriate relationship between the several paragraphs of the Court's order, specifically between the "voluntary" and the "mandatory". These disagreements led to several meetings of counsel among themselves and with the Court and, eventually, to the order of September 17, 1980, clarifying the earlier order, extending certain deadlines, and including the following:

> "1. (a) Paragraph 12(a) is hereby amended by changing the date of July 1, 1980 to December 15, 1980, and adding thereafter the following: The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient

cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished."

Since the time of that order, the frequency of discussions has increased. Commissioner Mallory and other members of his staff have been busy. They have met on several occasions with representatives of City and County districts. The Commissioner has spoken to many legislators in Jefferson City and elsewhere about parts of possible voluntary plans that may require legislation. He has proposed legislation that would provide fiscal incentives to cooperating districts.

Representatives of the School Board have continued their series of meetings, as earlier reported. The new President of the Board, Marjorie Weir, has discussed publicly her intention to continue the explorations of her predecessor, Gordon Benson, into cooperative arrangments with other districts.

At the suggestion of Commisioner Mallory, Superintendent Wentz wrote parents of City students attending all black school on September 22, 1980, as follows:

"Discussions are being conducted in an effort to work out a program for voluntary transfer of students between the St. Louis Public schools and County school districts. . . . If you have an interest in such a transfer, please fill out the form below and return it to your school tomorrow. It is understood that we are only asking for an expression of interest. This reponse will not be taken as an application for such a transfer."

The request was necessarily vague, because no such cooperative plan exists, but responses indicated interest on behalf of 2,234 children.

There have been other developments. The Conference on Education has held a series of meetings on interdistrict educational alternatives, bringing together people from various constituencies, educators and lay people, for continuing discussions. For several weeks now, some County superintendents have been talking together, and occasionally with others, informally. Sometimes these discussions have been attended by lawyers, sometimes not. The discussions have covered the kinds of concerns mentioned above, but increasingly they center on such educational alternatives as regional magnet schools, staff development, and cooperative programs involving students, staff and others.

It would be premature and misleading to report that there is a groundswell of enthusiasm in the County for interdistrict cooperation. Many wish the problem would go away. Increasingly, however, the realistic alternatives are crystallizing in the minds of those following not only developments in this case, but also the unfolding case law elsewhere. The political riptides surrounding the subject of mandatory remedies following findings of constitu-

tional violations by school districts seem to be forcing some rethinking. The recently publicized meetings in the County in protest of "forced busing" are but one example of the intensity of public interest. The discussions, therefore, seem to be turning away from instinctive first reactions and toward legal, as well as educational, realism.

Lawsuits are not settled when parties believe they are absolutely right and that the evidence will back them up. Lawsuits are settled because of uncertainties in the law, the evidence that may be available, the time and cost of vindication, even if it should come, in short: the possibilities and consequences of winning weighed against the possibilities and consequences of losing.

In this case, the City district has "lost". The County districts are not parties. The legal, social, political and educational problems that lead to such cases, however, are not generally understood to stop neatly at the intersection of political jurisdictions; hence the momentum in virtually every other city undergoing desegregation toward a metropolitan remedy of some kind. Elsewhere, these remedies usually have come, if at all, after years of litigation. They usually include mandatory as well as voluntary provisions. Most people, black and white, seem to dislike many of the mandatory provisions as they affect their children, especially if they do not lead clearly to a better education. Many people seem to prefer the voluntary provisions. Although such involuntary remedies as "busing" get the most attention, voluntary programs in other cities have been successful.

Increasingly, those in the County with whom I speak see the alternatives, briefly summarized, like this:

1. Do nothing, probably get sued and either win or lose. I do not know what the evidence is or might be. Missouri, however, segre-

gated its schools by law until 1954, so there does exist the possibility of a County district, as a statutory creation of the State, "losing", even if its officials themselves did nothing to promote segregation.

a. Under the existing state of the law, this thinking goes, if a district "wins" it would have to do nothing.

b. If a district "loses", however, experience elsewhere, including that in the City of St. Louis, strongly suggests that the remedy imposed for a constitutional violation will include mandatory provisions.

2. Seriously explore a voluntary, cooperative plan that is educationally and legally sound, and carries with it some protection against further desegregation litigation.

In the City of St. Louis, because of the demographics and the guidelines followed, the plan approved by the Court leaves some 32,000 black children still attending black or virtually black schools. Some find this a biting irony after a "victory" for black students following all these years of litigation. But there it is. There is no changing the fact that almost 80% of the children now in the City school system are black, although the parties differ about why that is.

All seem to concede that a County district cannot be forced into a "remedy" unless it is found guilty of a violation. Thus, like the County districts from the other side of the line, the present parties presumably are assessing the strengths of their own potential next steps. That at least has been reported, although I am not privy to those deliberations.

Again, the developing case law on interdistrict remedies seems inconclusive at best. Although no party to my knowledge has foreclosed any legal

recourse, including bringing County districts into the case, there does seem to be among all parties a serious interest in the "voluntary, cooperative" discussions here briefly described. No vote was taken, but I recall no dissent among the lawyers to an extension of time for the report required under paragraph 12a.

Thus, both the present parties and the County districts must look ahead with less than certainty. Again, the developing case law on interdistrict remedies seems inconclusive as applied to this case. The stakes for everyone are high. Depending on how one defines winning and losing, and the consequences of each, the reasons for the most serious exploration of a voluntary cooperative plan become compelling.

Can a voluntary plan include participating districts protection against further litigation? This surfaced early as a key legal question. I asked Bryan, Cave, McPheeters and McRoberts, the law firm with which I was previously associated, to consider the question. It did so (without charge) in a fourteen page opinion letter that posed these questions and summarized the answers, as follows:

> "(1) Is there a legal barrier to a resolution of potential school desgregation claims against a county school district by means short of full litigation of a district's liability?
>
> (2) To what extent can such a resolution eliminate a county school district's exposure to future school desegregation litigation?
>
> (3) What criteria must such a resolution meet?
>
> "As more fully discussed below, our conclusions are that it is possible to resolve such school desegregation claims without a full adjudication of the merits and that substantial protection against future litigation would be provided by incorporating this resolu-

tion in a court-approved settlement of a class action; this settlement would have to meet general criteria of procedural and substantive fairness and reasonableness. Although for illustrative purposes we necessarily discuss some details of a potential resolution, we are not offering an opinion on the merits of either a particular resolution or a particular procedure for implementing a resolution."

I have circulated this opinion letter to the Court, counsel to the parties in the case and counsel to the County districts. There are many other questions, of course, legal and educational. Among the legal are: how binding could such an agreement be?; do County districts have legal authority to enter any such agreement?; can a "cooperating" County district maintain its own legal autonomy?; will the Federal courts approve such a plan? Even assuming so, what procedures should be followed to preserve a district's rights? There are others.

While not all, or even most, of the questions are answered, many people at least are genuinely looking for answers. They are talking seriously. The process ordered by the Court to explore a "voluntary, cooperative" plan is well underway. It needs time and a lot of work. The challenge remains complex, but not, in my opinion, insuperable. Enough has been accomplished to suggest at least the preliminary framework for a plan of the kind the Court ordered studied. That framework is described in the next section.

PRELIMINARY FRAMEWORK OF

A

VOLUNTARY, COOPERATIVE INTER-DISTRICT PLAN

A "voluntary, cooperative" plan might have at least these broad characteristics:

1. It would be completely voluntary. As described more fully in the introduction, participation in any such plan by any school district would be voluntary, and participation in any such plan by any student would be voluntary.

2. The plan would offer new and attractive educational alternatives to all students. It is clear that at least part of the incentive for any school district to participate in a voluntary plan would be to provide its students with opportunities they do not now have. Those alternatives would be developed in a way that would both benefit all children and further desegregation. Commissioner Mallory, his staff and other educators are now actively working on many educational alternatives, as required by the Court's order.

   St. Louis has several models from which to learn. Other cities, notably Boston, Hartford, Milwaukee and Rochester, have experience with successful voluntary plans. Detailed information about these plans is available and is in circulation as these discussions continue.

   Regardless of any legal considerations, area-wide planning of educational alternatives seems to hold at least the promise of consolidating resources and saving money, greater flexibility in responding to population shifts with fewer disruptions, and en-

hanced educational alternatives. A detailed description of the alternatives is premature. But the Court should be aware that educators are in fact discussing the education for children, as directed.

3. Participation in a voluntary plan by a school district that is not now a party would carry with it substantial protection against future desegregation litigation. This is a key as well as a complicated element in obtaining public support for any overall plan. The memorandum from Bryan, Cave, McPheeters and McRoberts, is, practically speaking, at least a partial answer to the question posed by many in the County, "why should we do anything, when we have not been found guilty of anything?" By supporting a voluntary plan, they may be able to achieve real educational benefits and avoid extended litigation with the possibility of mandatory busing at the end. This could be a powerful inducement for a district to agree to a voluntary plan.

4. The plan would preserve the autonomy and independence of any participating district. In light of some information about experience in other cities undergoing school desegregation, representatives of several county districts have expressed their fear of losing local control, even the district itself, through merger or consolidation or Court order, should one ever affect them. There is, I find, considerable scepticism about metropolitan-wide school districts. A voluntary plan should include assurance that, so long as its provisions were carried out, any participating district would maintain its jurisdictional integrity.

5. County districts whose students are predominantly white would agree to take up to a substantial, but a minority, percentage, of black students. This is obviously a critical provision, because it would open the door of "integrated" education to black children now attending predominantly black schools, especially 32,000 plus black students in St. Louis still attending such schools. This agreement would be on the conditions that no student within any district would be displaced, space was available and the added costs of these transfer students would not be borne by the taxpayers of that district.

The key to this provision would be an acknowledged ceiling on voluntary minority enrollment from other districts in return for maintaining neighborhood schools, now threatened by declining enrollments, and allowing a substantial number of transfers that would further desegregation.

6. There would be free transfer across district lines for any student moving from a district in which he was in the majority race to one in which he was in the minority. The transfer rights would not be limited to city black children, although perhaps those children would have priority rights, as they are the only ones whose constitutional rights have been found violated. County black children, and all white children, would be allowed to transfer, too.

7. The plan should include transportation, although not necessarily of the traditional school bus kind. Cooperative arrangements with Bi-State, and other forms of transportation, should be explored.

8. Adequate financing. Participating districts would be reimbursed at least for at least their additional out-of-pocket-costs, and perhaps

more. The Milwaukee plan, the best known among such financing schemes, is only one example.

9. The State of Missouri would be an active participant in the plan, providing support ranging from expertise to funding.

10. There should be administrative structure adequate to supervise a metropolitan-wide plan of this kind, provide for continuing review and improvement, and coordinate long range educational planning.

This is only a preliminary framework for a voluntary, cooperative plan. A great deal more work must be done in each of these ten key areas. Others may identify other key areas. I welcome corrections and suggestions.

After these weeks of study and listening, however, I believe that a feasible alternative to continued litigation would be a voluntary, metropolitan-wide plan that answered the questions raised in these ten areas. Such a plan would be an acknowledged legal compromise. It would not be an educational compromise. To the contrary, instead of the probability of many more years in the courts, and with uncertain results, the parties, the potential parties and the public could concentrate on the quality of education for all children, even as they provided to black children significant additional alternatives for desegregated education.